In The
Supreme Court of Mayflower

No. 01-14

ZRIHEM ; TURBANWARFARE,

Petitioners,

v.

TDARK99

Respondent.

Appeal from the Mayflower District Court
for the District of Clark County

Before TURNTABLE, *Chief Justice*, TOTORO, STICKZA, CLARKE, CABOT, XIQAQ, KHALED, MANDATORY, and NOTABLE, *Associate Justices.*

KHALED, J., delivered the opinion of the Court. TOTORO J., concurred in the judgment. CABOT J., filed a dissenting opinion joined by TURNTABLE C.J., and CLARKE J.,

On August 28th, Respondent TDark99 was accepted to the National Guard and assigned to the 5th Mechanized Company. On some day, an incident involving the Respondent and a State Trooper led to the Trooper's death. Hours later, Adjutant General zrihem, declared the Respondent unfit for service and summarily discharged him from the National Guard. The discharge was classified as dishonourable, with no prior notice of hearing.

Believing this termination violated his due process rights, the Respondent initiated a suit against the National Guard claiming that the dishonourable discharge caused significant reputational harm. Although, later, the Guard rehired him and ultimately gave him an Honorable discharge, the original dishonourable discharge remained on

record. The District Court ruled in favour of the Respondent, finding that the Guard failed to provide procedural protection before the termination. The National Guard now seek to overturn that decision, arguing that the Respondent's employment was at-will, and the case is moot due to his re-employment and subsequent discharge. The matter is now before this Court on appeal.

I

The doctrine of at-will employment traces its roots back to English common law, where indefinite employment was presumed to last for one year unless proven otherwise. See 1 W. Blackstone, *Commentaries on the Laws of England* 413 (1769). However, the Union of Columbia, while influenced by English common law, declined to follow from this presumption. Instead, Horace Wood's seminal 1877 treatise, Master and Servant, introduced what became known as "*Wood's Rule*." This principle defined indefinite employment as terminable at will by either party unless a specific agreement or duration was established.

> "With us, the rule is inflexible, that a general hiring or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year; no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."

Horage G. Wood, *Master and Servant* §134 (cleaned up)

Although controversial, this rule became the bedrock of employment law and continues to be. Courts "had no doubt that the great preponderance of the best considered cases in this country recognize and affirm the rule laid down by Wood in his work on Master and Servant, and which he terms the 'American rule,' *Greer v. Arlington Mills Mfg. Co*, 43 A. 609, 612 (Del. Super. 1899). Far from being outdated, Wood's Rule continues to underpin employment law, which maintains that "either party may terminate an employment relationship with or without cause unless limited by statute." RESTATMENT

OF EMPLOYMENT LAW § 2.01. However, assumption disappears when a property interest is claimed.

Respondent asserts this right, thereby framing the question of whether Respondent held a property interest in his continued service in the Guard. The Due Process Clause, of course, does not itself define what constitutes a property interest. Rather, courts rely on "rules or understandings that stem from an independent source, such as state law—rules or understandings that establish certain benefits and create claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564. Property and liberty interests are not governed by fixed definitions but are instead informed by state law. See *Bishop v. Wood*, 426 U.S. 341. ("A property interest in employment can, of course, be created by ordinance, or by an implied contract.")

The National Guard's own policies, most chiefly Principle Four, leave no doubt. They plainly declare the Respondent's employment to be at-will. They likewise grant commanding officers the authority to discharge guardsmen for an array of transgressions, including behavior deemed "unfit for service," "gross misconduct," or damaging to "the image of the Guard." *Id.* These broad reasons, coupled with the explicit absence of required judicial proceedings, make it abundantly clear that the relationship is at-will. The Respondent contends that the policies at issue created a property interest in Dark's continued service, arising from the memorandums and policies. That dog won't hunt. As noted in *Harris v. City of Wilmington*, 644 F. Supp. 1483, 1487 (D. Del. 1986), "a subjective expectation of continued service does not suffice to establish a constitutionally protected property interest." For such an interest to arise, one must identify a bona fide legal entitlement, not a personal presumption of everlasting employment.

Squarely in the policies scope, Respondent allegedly disobeyed an order from Colonel Warfare—a textbook instance of "gross misconduct" under any layman, and sensible reading. The Guard's Zero Tolerance Policy explicitly provides dishonorable discharges in these circumstances, and it dovetails neatly with our Constitution which explicitly states that "the Adjutant General's judgment [is]

necessary to bring the organizations, armament, equipment, and discipline of the National Guard to a high degree of efficiency" MF. CONST. art. VII, § 4. (emphasis added). This unambiguous directive of authority from our Framers ensures that discharges remain essential tools in maintain readiness. Let us suppose, however, arguendo that the Constitution did not speak to us on this matter. The policies still affirm that commanding officers may mete out discipline or terminate service based on "reasonable judgment of infractions". So, it is no surprise that "[p]olicies state in great detail that … [state] employees are employed at-will and that the policies do not create an employment contract." *Darr v. Town of Telluride*, 495 F.3d 1243, 1253 (10th Cir. 2007). The Guard's policies therefore imply no permanent service, but rather unfettered discretion. Respondents cannot plausibly claim such a property interest. As the court aptly noted, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it." *Sims v. Fox*, 505 F.2d 857, 861 (5th Cir. 1974). The Guard's policy in the most plain text possible, disclaim any guarantees of continued employment, instead opting to reserve for discretion. That by itself eviscerates any notion of property interest, and his Loudermill claim. Both necessarily fail.

II

Although Respondent's position is undeniably at-will, the possibility remains that a liberty interest is implicated. After all, "even if a property right does not exist, a liberty interest may nevertheless be present." *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1226 (10th Cir. 1984). Similarly, the Union Supreme Court instructs us that us that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Indeed, lower courts have recognized that service members' liberty interests may be implicated when they are discharged under circumstances less than honourable. See *United States ex rel. Karr v. Castle*, 746 F. Supp. 1231, 1241 (D. Del. 1990); *Casey v. United States*, 8 Cl. Ct. 234, 241 (1985).

Ordinarily, a government employer's dismissal does not, by itself, amount to a deprivation of liberty. A dishonorable discharge, however, presents a different scenario. It confers a stigma on the individual and can foreclose future employment opportunitiesthereby triggering a liberty interest. Given these harmful ramifications, the law demands procedural safeguards, including a fair hearing, which offers "the individual … an opportunity to clear his name." *Codd v. Velger*, 429 U.S. 624, 627 (1977). Because no post-termination hearing—a crucial step for establishing the factual basis of any alleged reputational harm—has yet taken place, we cannot make a de novo determination on whether any stigma attached here. Without such a hearing, the record remains incomplete, and we decline invitations to pass judgment at this point.

If the lower court determines that Dark has a liberty interest at stake, the next question is straightforward: what process is due? As *Codd* explains, when the State imposes a "badge of infamy," it triggers the instantaneous need for a name-clearing hearing. But this isn't a solely bureaucratic tickboxing exercise, it should be a chance to allow the individual to confront the allegations, cross-examine their accusers, and present independent evidence to refute these claims. *See Walker v. United States*, 744 F.2d 67, 70 (10th Cir. 1984) ("procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood") (citing *Willner v. Committee on Character*, 373 U.S. 96, 103 (1963); *McGhee v. Draper*, 564 F.2d 902, 911 (10th Cir. 1977)). The respondent insists the tribunal is inherently unbiased, but one can almost hear *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) sighing at the proposition. This is a hypothetical the respondent hasn't even bothered to substantiate, let alone attempt to engage with meaningfully. Assertions without evidence do not make for serious arguments, and *Lujan* would be the first to remind us that courts deal in actual cases and controversies, not theoretical musings untethered from the facts. A proper tribunal would afford the opportunity to challenge potential bias recusal mechanisms for this very reason. The respondent had the option to appeal to the district court on the matter of the guard allegedly violating its own policies, a route outlined in various case

law. Frankly, this is the kind of argument a well-meaning first-year law student ("1L") at Mayflower State University would hesitate to submit, knowing it would collapse under even cursory scrutiny – a point I vividly remember from attending a lecture by Professor Justice CLARKE as a visitor on the art of debate, "These are arguments which do not seek to prove/gain anything and are just done to argue… they [will waste] valuable time" (1L-4 Lecture Slides, *Mayflower State University, Professor Acertrxo* PhD – published with permission).

IV

Finally, let us tackle the matter of jurisdiction. The very policies on which the Respondent stakes his purported property right also spell out an avenue for appeal of disciplinary actions namely, the tribunal now known as the Guard Appeals Board. Evidence has been presented confirming the existence of this board and its operation beyond the standard four-month span. And because the Supreme Court has ruled "…no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting," which underscores the necessity for specialized regulations and a unique system of military justice" *Chappell v. Wallace,* 462 U.S. 296, 300 (1983), Respondent therefore should have pursued his appeal through the Guard Appeals Board before seeking recourse in a civilian court. If this wasn't enough, the *Mindes* test, slams the breaks. It makes clear, pristinely that "...a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures" (*Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971)). Respondent necessarily fails in his claim because he did not exhaust the remedies available to him. Exhaustion is a well-established requirement in military-related cases, supported by a wealth of precedent too extensive to enumerate here. More critically, "…the Court concluded that "[i]f an available procedure has not been employed to rectify [an] alleged error [in a military judgment] which the ... court is asked to correct, any interference by the ... court may be wholly

needless." (*Winck v. England*, 327 F.3d 1296, 1301–02 (11th Cir. 2003), quoting *Gusik v. Schilder*, 340 U.S. 128 (1950)).

But, if our jurisdiction was proper, through some other means, our role as an appellate court is a role of last resort, not first view. As my brother TOTORO notes: "We cannot usurp the role of the District Court by assuming jurisdiction... to crown ourselves king of both law and fact." (*DivineCrime et. al. v. Mayflower Elections Comm'n* 1 Mayf.__(2024) (TOTORO, J., concurring in the denial) (pending)). Nor does our Constitution hand us the sweeping power of original jurisdiction: it confines this Court to "final appellate jurisdiction," not the District Court's "original jurisdiction." MF. CONST. art. X, § 2. Questions of stigma-plus must be addressed first in the lower courts before we are called upon to pronounce final judgment.

As already declared, this case is not ripe for appellate review, and we remand it to the District Court of Clark County for further proceedings. The procedural and jurisdictional issues remain unresolved, and it is the District Court's role—not ours—to address them in the first instance. Our Framers explicitly rejected the concept of "anytime review," as practiced in Nightgaladeld's United States of America, favoring instead a system that prioritizes thorough District Court fact-finding before appellate intervention. First, the District Court must determine whether the Appeals Board is authorized to conduct a name-clearing hearing. The policies invoked by the Respondent provide for an appeal to this Board, yet its legitimacy as a tribunal capable of satisfying constitutional due process requirements remains unresolved. Second, the District Court must apply the *Mindes* test to evaluate the appropriateness of judicial review in this case. That analysis requires addressing two prongs: (1) Has the Respondent alleged the deprivation of a constitutional right or the violation of applicable statutes or regulations? If stigma-plus exists, it may satisfy this prong. (2) Has the Respondent exhausted all intraservice remedies? On this point, his claim falters. Exhaustion is not optional; it is a prerequisite for judicial review. Third, the District Court must determine whether stigma-plus applies and, if so, whether it triggers a liberty interest requiring a name-clearing hearing. It is a fact of law that a dishonorable discharge inherently carries

stigma, but stigma alone is insufficient. The lower court must determine whether the stigma, when combined with other factors, rises to the level of a liberty interest warranting constitutional protection.

* * *

We have clarified what process is due in our opinion, and it is now the responsibility of the District Court to address these outstanding questions. Only after these determinations are made can this case properly be returned to us, if at all, for final appellate review.

REVERSED AND REMANDED

JUSTICE STICKZA took no part in the consideration or decision of this case.

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CABOT, J., dissenting, joined by TURNTABLE, C.J., and CLARKE, J.,

Today, we are left with a peculiar outcome. The Opinion of the Court led by Justice KHALED is simply not worth the paper it is written on. It changes the situation of the respondent in no intelligible way. It changes the law in no meaningful way, and we have not sufficiently solved the issues before us to provide the utmost clarity for the hundreds of workers employed in this state's public services. However, we cannot blame Justice KHALED for this deficiency.

Instead, the real issue with the outcome today and the fault for such a decision, or lack thereof, lies with the moronically phrased question before this court for adjudication and our failure to rephrase and re-propose it. Simply put, the plurality is a non-answer to a stupid question. Therefore, the question before the court is: What type

of interest does the respondent have? That question determines this court's attitude towards at-will employment and whether we have a property interest, a fundamental liberty interest, or some other sort of constitutional interest.

First, this opinion affirms that this court has the right, or even the obligation, to raise a new legal argument *suo motu* regarding whether a property interest exists. Second, it analyzes the extent to which the Takings Clause provides appropriate protection by classifying public employment as "property" due to a secure expectation of tenure. In turn, we argue that a takings claim is a sufficient course of redress for a deprivation of employment and one that would have succeeded if raised in this case.

This court is both justified and obligated to raise and apply a new argument that neither of the parties did raise in their briefs where a "litigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly." *Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 164 (7th Cir. 1995) (Easterbrook, J.) Indeed, courts across the Union of Columbia would choose to apply a more harmonious interpretation raised *sua sponte* "rather than apply an incorrect rule of law to the parties' circumstances." *Ibid.* We adhere to that view today.

The amount of new information, claims, defences and availing interests raised by the parties on appeal have led their briefs to constitute something closer to "[a] skeletal 'argument'… [that] does not preserve a claim… Especially not when the brief presents a passel of other arguments." See *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Parties are under a general obligation to "make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud." *United States ex rel. Garst v. Lockheed-Martin Corp.,* 328 F.3d 374, 378 (7th Cir. 2003). It is precisely because "…judges are not like pigs, hunting for truffles buried in briefs" *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) that we cannot be seriously expected to entertain such procedural tomfoolery which risks obscuring the substantive constitutional and liberty interests at play here.

Judicial officers are officers of unwavering authority and impartiality. It is that very authority that compels us to address ambiguities that jeopardize the rights of individuals. Consequently, we must do our utmost to avail the respective parties' interests to deliver an outcome consistent with the principles of natural justice.[1] The real tension here arises not from our decision to bring this substantive issue up *sua sponte* but from this power being "a byproduct of the merger of law and equity". Miller, *supra* note 1, at 1263. The disagreement that will come with this point arises from a difference of opinion as to whether the courts have an obligation to see that 'justice' is done and to mitigate the harsh effects brought about by the common law. The much more learned, intelligent and thought-provoking academics in this field find there are "no discernible differences" with issues raised *suo motu* on the grounds mentioned beforehand.[2] Indeed, "[c]ourts are more likely to raise a new issue without briefing if there is little additional work involved." Miller, supra note 1, at 1284 (citing Allan D. Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L. Rev. 477 (1958-59)). However, courts have an obligation to address a new question or the same question with a new answer if the answer is "clear" *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) or if "the proper resolution is beyond any doubt" *Singleton*, 428 U.S. at 121 (citing *Turner*, 369 U.S. 350)). Again, the answer here is not only clear, but the application of the Takings Clause is the proper resolution beyond any doubt.

The "plain error" exception which derives itself from criminal procedure but is also applied to civil cases[3] places an inherent duty

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[1] Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard, 39 San Diego L. Rev. 1253, 1268 (2002).

[22] Robert J. Martineau, Considering New Issues on Appeal: The General Rule and the Gorilla Rule, 40 Vand. L. Rev. 1023, 1054 (1987). See also, Joan Steinman, Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance, 87 Notre Dame L. Rev. 1521 (2012).

[3] See, e.g., *Holmes v. Texas A&M Univ.,* 145 F.3d 681, 685–86 (5th Cir. 1998) (citing *Highlands Ins. Co. v. Nat'l Union Fire Ins. Co.,* 27 F.3d 1027, 1031–32 (5th Cir. 1994)); *Chute v. Sears Roebuck & Co.*, 143 F.3d 629, 631 (1st Cir. 1998); *Crawford v. Falcon Drilling Co.*, 131 F.3d 1120, 1123–24 (5th Cir. 1997); see also *In re Celotex Corp.*, 124 F.3d 619, 631 (4th Cir. 1997) (recognizing civil plain error, but possibly envisioning a standard harsher than in criminal cases).

on the court to correct a plain error that is viewed as "absolutely vital" to a party's interests that the court "feels [itself] at liberty to correct". See *Wiborg v. United States*, 163 U.S. 632, 658 (1896).[4] Plain error exists when "the errors were obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." See *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009) (internal quotation marks omitted). Again, the courts will consider new legal positions (i.e., 'pure questions of law') on the condition that they need no further factual development.[5] These 'pure questions of law' have long included the application and interpretation of constitutional provisions.[6] See *Nelson v. Adams*, 529 U.S. 460, 469-70 (2000). These have also included decisions which have been classed as ones of "constitutional magnitude" (quoting *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 125 (1st Cir. 2010)).

The doctrine of constitutional avoidance is just that, a doctrine, that is malleable at the will of the courts. The doctrine attempts to strike a balance between the equitable and common law functions of the courts. This can be seen through its primary purpose serving as a restraint on judicial power. For that, my colleagues who disagree with this analysis may be forgiven. Any objection on the grounds of constitutional avoidance is roundly defeated on the basis that we have an obligation to settle matters of constitutional importance if those are matters of "general impact" or "great public concern." *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1345 (Fed. Cir. 2001)). The consideration of matters of public interest or those that invoke the implementation and enforcement of public policy initiatives will also draw the courts in to decide legal issues by their

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[4] See also *United States v. Atkinson*, 297 U.S. 157 (1936); Miller, supra note 1, at 1283 (supporting the proposition that the "plain error" exception is applied in civil cases as well).

[5] See *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 (D.C. Cir. 1992).

[6] See also *Ninestar*, 667 F.3d at 1382; *Consol. Coal,* 351 F.3d at 1378.

own motion.[7] Frankly, I s[8]ee no good reason to shirk from that responsibility now.

In many cases there need not be any substantive reasoning, justification or compelling interests to diverge from the presented legal questions before the court.[9] It is because "if [judges] think a case is really important or if the judges really want to reach a particular result" they necessarily have an obligation to intervene and prevent an injustice from occurring, such as in the case here. Miller, supra note 1, at 1287. Again, this is wholly consistent with our obligations, following the fusion of both systems, to "soften and mollify the extremity of the law" *The Earl of Oxford's Case* (1615) I Ch Rep 1, *per* Lord Chancellor Ellesmere. However, as mentioned before this is not a decision taken on a whim, this is a decision and subtle divergence from the legal question presented to resolve the matter simply, clearly and in compliance with the existing principles of common law that bind our decision-making process here. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It is a fundamental principle of American jurisprudence that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). We do nothing short of that here today.[10]

II

Throughout this portion of the opinion, I shall put forward the case that workers across the State of Mayflower, including the respondent, have a constitutional property right in their job which the

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[7] See *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 (4th Cir. 1995) (supporting intervention in matters of public interest). See also *Nuelsen v. Sorensen*, 293 F. 2d 454, 462 (9th Cir. 1961); *Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (supporting intervention in matters of public policy).

[8]

[9] *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

[10] "[A] court may consider an issue 'antecedent to . . . and ultimately dispositive of 'the dispute before it, even an issue the parties fail to identify and brief." (quoting *Arcadia v. Ohio Power Co.,* 498 U.S. 73, 77 (1990)).

state takes away with at-will employment rules, both through legal rule and statute. Such a claim finds its origins and sanctuary in the Fifth Amendment's Takings Clause.

A

It is important to set a pretext for where we are currently in the development of economic rights under the Takings Clause by giving a quick analysis of the Due Process Clause on this matter. The current position in Union of Columbia law is that economic rights are not privileges or immunities which give rise to protection – nor are they protected by the Due Process and Equal Protection clause of the Fourteenth Amendment.[11] The seminal case for this proposition is the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) with Justice Miller writing for the majority in its 5-4 opinion. The holding essentially gutted the Privileges and Immunities Clause. *Id.* at 74.[12] It was a step in the wrong direction and antithetical to legislative purpose and intent behind the Fourteenth Amendment's ratification, namely, to give rise to fundamental rights including through the entrenchment of the Civil Rights Act 1866.[13] We would, find refuge for the right to earn a living here if such an awful decision were not handed down in *Slaughter-House*.

This "demise" of a central component of the Fourteenth Amendment has seen many lawyers, including Justices Thomas and Chief Justice Rehnquist, to understand that a correction to Justice Miller's antithetical interpretation of the Fourteenth Amendment can only be reevaluated "in an appropriate case" where we as judges

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[11] David S. Bogen, Slaughter-House Five: Views of the Case, 55 Hastings L.J. 333, 337 (2003).

[12] "It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose"

[13] See CONG. GLOBE, 39th Cong., Ist Sess. 2459 (1866) (Rep. Stevens); id. at 2462 (Rep. Garfield); id. at 2465 (Rep. Thayer); id. at 2467 (Rep. Boyer); id. at 2498 (Rep. Broomall); id. at 2502, 2513 (Rep. Raymond); id. at 2511 (Rep. Eliot); id. at 2539 (Rep. Farnsworth); id. at 2542-43 (Rep. Bingham); id. at 2765 (Sen. Howard); id. at 2896 (Sen. Doolittle); id. at 2961 (Sen. Poland); id. at app. 219 (Sen. Howe); id. at 3035 (Sen. Henderson).

should "endeavor to understand what the framers of the Fourteenth Amendment thought it meant". *Saenz v. Roe,* 526 U.S. 489, 527-528 (1999) (Thomas, J., dissenting, joined by Rehnquist, C.J.) It is because of this idiosyncrasy that our approach to economic rights in Union law is inconsistent with the laws, purpose and constitutional intent that we find applicable in the State of Mayflower. Instead, the Fifth Amendment's Taking Clause State protection against at-will employment requires strict scrutiny analysis rather than the rational basis test that is presented by the petitioners.

It is precisely because the states have always been viewed as laboratories for the expansion of rights, liberties and other socio-economic and legal experiments that we find the right to earn a living in our constitution today.[14] Our decision remains consistent with that sentiment.

B

The criticisms of *Wood's* Rule and the implementation of at-will, that was first recognized as good law by the New York Court of Appeal, are plentiful.[15] The idea that public sector workers, like in the case of the respondent here, have the ability to engage in the freedom to contract with a reasonable employer (the state) is misplaced in our context. See *Adair v. United States*, 208 U.S. 161, 174 (1908) (treating at-will doctrine as equivalent to liberty of contract). It is based on the idea that protectionist regulations and for-cause provisions are already implemented or at least offered to be implemented in their

[14] See *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of those happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the [Union].")

[15] Paul C. Weiler, Governing the Workplace (1990) (describing the inadequacy of the at-will rule as a default); Rachel Arnow-Richman, Modifying At-Will Employment Contracts, 57 B.C. L. Rev. 427, 429-34 (2016) (criticizing the at-will rule's misfit within broader contractual principles); Kate Andrias & Alexander Hertel-Fernandez, Ending At-Will Employment: A Guide for Just Cause Reform, Roosevelt Inst. 4-7 (2021), Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It) (2017) (relying on the at-will rule as a prime example for the authoritarian nature of work); Joseph E. Slater, The American Rule That Swallows the Exceptions, 11 Emp. Rts. & Emp. Pol'y J. 53, 93-108 (2007) (criticizing the stickiness of the at-will default).

contracts.[16] This is not the case, in fact it is to the contrary that such occurs.

It is antithetical to the doctrine of freedom to contract that the courts and legislatures-imposed regulations *onto* employees, who had no bargaining power, to the widespread glee and benefit of their employers. See James Atleson, Confronting Judicial Values: Rewriting the Law of Work in a Common Law System, 45 Buff. L. Rev. 435, 446-47 (1997). The supposed theoretical basis for at-will employment is simply inapplicable to our state—namely that contractual flexibility will increase economic productivity (a consideration that is alien to our state). The majority's complacent adherence to the at-will rules "instead of narrowly tailoring its applicability in order to remain relevant to our ROBLOX platform, is reckless and it sends the wrong message to our lower courts" *State of Mayflower v. TrexeoDev* (2024) (slip. op. 4) (TURNTABLE, C.J., dissenting joined by CABOT, J.). Here, at-will employment on ROBLOX is nothing but a tool to be used as a 'gotcha' card in litigation and as a way of reminding employees that we have not really moved away from the master-servant doctrine.

Now if we asked workers across the state if they believed they could be fired for any reason: for good, for bad, for middle-of-the-road or for no reason at all I would be surprised if any sizeable amount of them believed their employer could dismiss them at their discretion. There is an *expectation* that such an at-will regime does not exist, especially not in public employment. At-will rules are regularly cited as justification for the subpar conditions of workers and serve to act as a 'backup' provision that serves to unfairly bloat the litigatory inventory employers have at their disposal to subjugate their employees. They have the effect of unconstitutionally chilling the voices of employees across the State, including in public services, where we would expect their voices to be protected most to encourage a safe environment to report abuse and root out unfair

[16] See Jane Berger, A New Working Class: The Legacies of Public-Sector Employment in the Civil Rights Movement 4 (2022); Gary Minda, The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine, 36 Syracuse L. Rev. 939, 946-49 (1985)

practices. At-will rules displaced a web of common-law doctrines and legal assumptions under which employment duration was a year by default, and termination before a year had to be for cause and noticed. In fact, Court's opinion makes little sense when they recognize that the respondent was fired *for cause* (i.e., a specific reason).

A constitutional claim under the Takings Clause is the solution for public sector workers, not least because their property interest is easily identifiable and actionable as the defendant is by-default a state-actors

C

Job security, as mentioned above, implicitly suggests workers possess a constitutional property right in their jobs.[17] In the public sector, as in the private sector, the default termination rule is employment at will. See, e.g., *Cafeteria & Rest. Workers Union v. McElroy,* 367 U.S. 886, 896 (1961) ("It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.") For the purposes of this analysis, we set aside the existence of the state at-will statute, which under our interpretation is unconstitutional, on the basis that the court's majority fails to rely on such. Courts overwhelmingly affirm the connection between public-sector job security and property rights. These terms—job security and property rights on the job—are synonymous. The most common term for a property-granting job-security employment arrangement is "just cause." If public-sector employees prove that an employer can terminate them only for "just cause," courts recognize that these employees have property rights in their positions. See e.g., *Mancini v. Northampton County*., 836 F.3d 308, 315 (3rd Cir. 2016) (holding that just-cause employment entails a protected property interest in the job). Following *Roth*, the test courts use is whether the employee could reasonably expect their employment would not be terminated without cause.

1

[17] Kenneth A. Sprang, Beware the Toothless Tiger: A Critique of the Model Employment Termination Act, 43 Am. U. L. Rev. 849, 881-82 (1994).

The Union Supreme Court has been light on detail as to whether "property" means the same thing in all clauses of the Union Constitution and in all contexts. We do know that constitutional property stretches beyond land and physical "things." A state can unconstitutionally "take" a contract, for example. James Y. Stern, *Property's Constitution*, 101 Calif. L. Rev. 277, 279 (2013). There are three theories espoused by Garci Racabi in his Article[18] – all of which are substantively convincing in establishing a constitutional property interest in one's job. First, the physical theory justifies a property interest as originating from the employee's interest in attending and accessing the workplace every day.[19] The second theory relies upon property relations connoting a recognition of stability. Property in the job entails the legal entrenchment of stability between an employer an employee—this is especially true in those that serve in public-service jobs who also have a commitment that impacts and involves the wider-community. Racabi, supra at 17, puts it best by stating "[a]ll workers already enjoy an almost complete *in rem* right against intervention in their work. Job security closes the *in rem* loop by immunizing workers from certain actions by employers. Thus, job security is property because workers are protected from arbitrary interference in their job against all." The third theory relies on the takings clause being a sufficient cause of action and in turn giving rise to a constitutional property interest. Although this third theory is circular by itself, combined with the other two theories, it gives rise to a convincing takings clause claim for denial, deprivation or revocation of employment for public sector employees. These theories, although derived from cases concerning job security as a property entitlement in the public sector and under the Due Process Clause, are not limited to those contexts, and apply equally to Takings Clause claims.

We choose not to investigate private employment under the Takings Clause analysis here (1) because it is not invoked by the parties

[18] Gali Racabi, At Will as Taking, 113 Yale L.J. 2257 (2024).
[19] See Yiran Zhang, Home as a Non-Workplace, B.U. L. Rev. (forthcoming 2024/2025).

here and (2) it is but a mere technicality to just transpose the protections and expectation interests when the time comes.

2

Constitutional doctrine has explicitly rejected the premise that public-sector employment is a mere privilege and public-sector employment as property is still good and evolving law.[20] It is precisely because "due-process right[s] provide no substantive protection for public sector employees and immunize[s] legislative deprivations of property" that "expanding claims beyond the Due Process Clause to the Takings Clause would be beneficial". Racabi, supra at 17. Since legislative bodies and their statutory outputs are not immune against takings claims it follows that a takings claim is therefore the most sufficient cause of action possible for a claimant here. Due process rights are also considered to be exhausted by the legislative body's deliberation, no similar assumption exists for takings, again providing the claimant with a sufficient 'property' leg to stand on. Whilst the precise definitions of property under takings claims and due process claims differ slightly, we do not see this as a problem. A simple look to the historical recognition of employment as property in the English common law is sufficient for us.

3

At-will rules are viewed here as a taking.[21] The Fifth Amendment to the Constitution stipulates that "private property [shall not] be taken for public use, without just compensation. The basic takings claim requires three elements: (1) a property (2) being taken for public use (3) without just compensation. See Michael B. Kent, Jr., Public Pension Reform and the Takings Clause, 4 Belmont L. Rev. 1, 14 (2017). Takings involve benefits received at the expense of another and not simply the deprivation or abolition of property

[20] See, e.g., *Garrity v. New Jersey*, 385 U.S. 493, 499-500 (1967).

[21] "For most people, their job is their principal asset. They have invested their skill and their strength in the job: Just as the Government may . . . for the public good, deprive a person of land and other property, so it may be . . . that a person may have to sacrifice his job. But in both cases a rule of social ethics requires that he who sacrifices an asset should receive a fair amount of compensation." See Otto Kahn-Freund, Labour Law: Old Traditions and New Developments 38 (1968).

autonomously. With at-will employment, employers enjoy the taking of workers' reliance interests. Essential in this analysis is "whether the government has physically taken property for itself or someone else—by whatever means," thus triggering [a] physical takings claim, "or has instead restricted a property owner's ability to use his own property," thus triggering [a] regulatory takings claim. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). In this case and for the purposes of our argument, a deprivation of employment by the state constitutes a categorical (a.k.a. 'physical') takings claim.

Under the reliance theory, at-will rules explicitly remove the most significant benefit workers draw from just-cause employment: a legitimate right of reliance. Under this presupposition a takings claim against an at-will regime can be resurrected in a protective manner thus preventing public-sector workers from changes in their termination regime. Government at-will employees lack certain constitutional protections that workers with job security enjoy in a seemingly unfair dichotomy to us. Takings claims ought to have a role in the constitutional toolbox of public sector worker's liberty and employment-driven fight against the power of the state. Removing workers' job security is an unconstitutional taking and the Opinion of the Court makes a grave mistake in failing to realize this today.

* * *

With sorrow—for this Court, but more, for the many hundreds of workers employed across the State of Mayflower's public services who have today been denied the existence of a fundamental constitutional protection—we respectfully dissent.